Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

vs.

MARIO GARZA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The State Of Kansas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

WHETHER AN *EX PARTE* PRETRIAL HEARING TO DETERMINE WHETHER WITNESSES RETAIN THEIR FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION DENIES THE ACCUSED THE RIGHT TO CONFRONT WITNESSES AND IS A CRITICAL STAGE OF THE TRIAL PROCEEDINGS UNDER THE SIXTH AMENDMENT REQUIRING THE PRESENCE OF THE ACCUSED.

WHETHER A TRIAL COURT'S INADVERTENT LEAVING OF EXTRINSIC LEGAL MATERIALS IN THE JURY ROOM LEADING TO JUROR MISCONDUCT IS *PER SE* CONSTITUTIONAL ERROR.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

The State of Kansas respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of Kansas.

OPINIONS BELOW

A copy of the to-be-published Memorandum Opinion of the Kansas Court of Appeals reversing Respondent's convictions (Appellate Case No. 77294) is contained in the Appendix. (App. 3-13).

A copy of the unpublished Kansas Supreme Court Decision denying the State of Kansas' Petition for Review is contained in the Appendix. (App. 14).

A copy of the unpublished Kansas Supreme Court Decision ordering that the Memorandum Opinion be published is contained in the Appendix. (App. 15).

STATEMENT OF THE BASIS FOR JURISDICTION

The Kansas Court of Appeals reversed Mario Garza's convictions and remanded the case for a new trial on January 29, 1999. The Kansas Supreme Court denied the State of Kansas' Petition for Review on April 27, 1999 and issued the mandate on April 29, 1999. Jurisdiction is conferred with the United States Supreme Court pursuant to 28 U.S.C. §§ 1254 and 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Mario Garza was convicted of sale of marijuana and possession of marijuana without a drug tax stamp. Melissa Shelby acted as a buyer and was a key witness to the sale of marijuana. A pre-trial hearing was held to determine if Shelby intended to invoke her Fifth Amendment privilege. Shelby appeared with her attorney and wished to invoke her privilege against self-incrimination. The trial court allowed the State to present arguments why Melissa Shelby's testimony would not violate her Fifth Amendment privilege. (IX, 2-3). The State argued that the statute of limitations had run on the offense and Shelby had already pled guilty to charges arising out of this offense. (IX, 4-5). Shelby's attorney had a concern that being compelled to testify would cause her to incriminate herself and that she should have immunity. (IX, 5-6).

The trial court noted that Shelby had already testified at preliminary hearing. (IX, 8).

Shelby would not elaborate why she was asserting the Fifth Amendment. (IX, 10-11). The trial court concluded that if Shelby was going to invoke the Fifth Amendment, then she could not be called as a witness. Shelby was ordered to appear for trial but she would not testify absent immunity. (IX, 15-16). On the morning of trial, the trial court explained to Garza's counsel what had transpired at the earlier proceeding. (X, 4-7). The prosecutor advised the he had a grant of immunity prepared by the district attorney to alleviate any questions about whether Shelby could assert her right against self-incrimination. (X, 7). Garza's attorney objected on the grounds that the hearing violated Garza's right to confrontation and due process rights. (X, 10-11).

Respondent's motion for new trial alleged that it was jury misconduct for the jury to read the Kansas Advance Sheets during deliberations. After the jury returned its verdict, a juror stated that they had found a case on point in the Kansas Advance Sheets, which held that when a witness testified "She did not recall," her prior statements were inadmissible. Respondent argued the jurors' research during deliberations substantially prejudiced defendant. (I, 95). Respondent's motion alleged that the jurors found a case that held when a witness testified she did not recall, her statements were inadmissible. From this, the jurors were able to conclude that Shelby's previous statements would be inadmissible. Defense counsel somehow concluded that the jury was able to return a verdict of guilty only after reviewing the case found in

the Kansas Advance Sheets. (I, 96-97). At the hearing on the motion for new trial, defense counsel conceded:

> To what degree the juror misconduct played in their deliberations and ultimate verdict, I don't know and I don't think any of us can speculate how severely my client was prejudiced based on that. But I think it's clear my client was prejudiced and based on that, those are grounds for a mistrial or a new trial. (XI, 11).

The prosecutor stated that a Kansas Reporter that was tabbed to the case of *State v. Johnson-Howell* was left in the jury room and one of the jurors opened it up to the tab and their comments were essentially that they thought it was kind of funny that another prosecutor had that same problem. (XI, 26). After listening to arguments of counsel, the trial court concluded:

> The Court has heard counsel's argument, and I certainly wish that book had not been left in that jury room but I am not at all persuaded that it had any influence whatsoever over the jury deliberations and their final conclusion. (XI, 31).

REASONS FOR GRANTING THE PETITION

I. WHETHER AN *EX PARTE* PRETRIAL HEARING TO DETERMINE WHETHER WITNESSES RETAIN THEIR FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION DENIES THE ACCUSED THE RIGHT TO CONFRONT WITNESSES AND IS A CRITICAL STAGE OF THE TRIAL PROCEEDINGS UNDER THE SIXTH AMENDMENT REQUIRING THE PRESENCE OF THE ACCUSED.

The Kansas Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court.

"The right to confrontation is basically a *trial* right." *Barber v. Page*, 390 U.S. 719, 725, 88 S.Ct. 1318, 1322, 20 L.Ed.2d 255 (1968). The trial had not commenced when these two hearings were conducted. An accused's constitutional rights of confrontation are not violated by an *ex parte* hearing to set an appearance bond for a reluctant material witness. *State v. Hamons*, 248 Kan. 51, 805 P.2d 6 (1991).

A hearing to determine whether a witness would invoke the Fifth Amendment or whether the grant of immunity was properly written is not a stage of the trial. The only issues considered at the hearing were whether Melissa Shelby would invoke the Fifth Amendment and whether, after being granted immunity, she would still invoke the Fifth Amendment. There was no evidence or testimony regarding any aspect of the crime. The district attorney was not allowed to examine the potential witness.

The confrontation clause guarantees criminal defendants the right to confront their accusers. *Coy v. Iowa*, 487 U.S. 1012, 1016, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988). The purpose of the clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. *Maryland v. Craig*, 497 U.S. 836, 111 L.Ed.2d 666, 110 S.Ct. 3157 (1990). The confrontation clause provides two types of protections for defendants: the right physically to face those who testify against them; and the right of cross-examination, a primary interest of the confrontation clause. *Coy v. Iowa*, 487 U.S. at 1021.

The accused has a due process right to be present at any stage of the trial "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987). The accused's presence at a pre-trial hearing to determine a witness' Fifth Amendment rights has no reasonably substantial relation to his opportunity to defend against the charge. Due process does not require the presence of the petitioner when his presence would be useless or only slightly beneficial. *Snider v. Massachusetts*, 291 U.S. 97, 106-07, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934).

The accused's presence is not required at a conference or hearing at which he could do nothing, such as a hearing on a motion that concerns only matters of law. *U.S. v. Gagnon*, 470 U.S. 522, 527, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985). Under *Gagnon*, neither the confrontation clause nor due process required that defendant be

present when the judge made inquiries of a juror regarding an event at the trial unless a fair and just hearing would not be possible without defendant. In this case, the hearing concerned a matter of law: whether Melissa Shelby was asserting her right against self-incrimination; and once she was granted immunity, whether she would still assert that right. L cking any standing to assert another person's Fifth Amendment right, Garza could have done nothing at this hearing, which concerned only a matter of law. Shelby testified at trial that she was granted immunity (State's Exhibit 11) for her testimony. (V, 46-47).

II. WHETHER A TRIAL COURT'S INADVERTENT LEAVING OF EXTRINSIC LEGAL MATERIALS IN THE JURY ROOM LEADING TO JURY MISCONDUCT IS *PER SE* CONSTITUTIONAL ERROR.

The Court of Appeals ruled that the jury's reading of *State v. Johnson-Howell*, 255 Kan. 928, 935, 881 P.2d 1288 (1994) in the jury room was clearly misconduct that substantially prejudiced Garza. The panel surmised that the jury could read the case and "speculate that Shelby had made incriminating statements similar to the witness in *Howell-Johnson* [sic] and that these statements were being kept from them." Opinion at App. 7. The panel felt the case was distinguishable from other cases where the mere reviewing of a case law reporter did not amount to sufficient evidence to necessitate a new trial. Because "[i]n *none* of the cases, however, did the jurors read a case directly on point to the issues in the trial from extrinsic legal materials left in the jury room *by the court itself*." Opinion at App. 8 (emphasis in original). But the result

should not be different solely because of the trial judge's inadvertence. While Judge Cleaver certainly wished that book had not been left in that jury room, he was not at all persuaded that it had any influence whatsoever over the jury deliberations and their final conclusion. (XI, 31).

The mere reviewing of a case law reporter does not amount to sufficient evidence to create the necessity of a new trial. *U.S. v. Hill*, 688 F.2d 18, 20 (6th Cir.), *cert denied*, 459 U.S. 1074 (1982) [rejects a *per se* rule of reversal whenever a jury is exposed to extrinsic legal materials; there must be some likelihood the extrinsic materials could have affected the verdict to justify a new trial]; *U.S. v. Duncan*, 598 F.2d 839, 866 (4th Cir), *cert. denied*, 444 U.S. 871 (1979) [while juror reference to dictionary for definitions of "intent" and "motive" was misconduct, it was not prejudicial *per se* and no formal hearing was required].

The jury's review of the *State v. Johnson-Howell* case did not influence the verdict. From *Johnson-Howell*, the jury knew that Shelby's prior statements were inadmissible. This was no surprise, as the jury heard no evidence of Shelby's prior statements to police. Nothing in the *Johnson-Howell* case references Shelby's prior statements.

The jury was further instructed that it should base its verdict upon the evidence presented at trial. (I,19). They were instructed to apply the jury instructions to the facts. (I, 18). Juries ordinarily are presumed to follow the court's instructions. See *Greer v. Miller*, 483 U.S. 756, 766, n. 8, 107 S.Ct. 3102, 3109, n. 8, 97 L.Ed.2d 618 (1987).

CONCLUSION

The accused lacks standing to contest whether a prosecution witness has a privilege against self-incrimination. An *ex parte* pre-trial proceeding to determine a witness' privilege against self-incrimination does not violate the accused's Sixth Amendment right to confront witnesses.

Respondent was not denied the right to a public trial by an impartial jury when the trial court inadvertently left a case law reporter in the jury room. The constitutional error is not greater because a trial judge's actions led to the jury misconduct. The standard should be the same as for any type of juror misconduct: there must be some likelihood the extrinsic legal materials affected the verdict to justify a new trial. Reading a case about the procedure of dealing with hostile witnesses does not justify a new trial.

Petitioner respectfully prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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MANDATE

COURT OF APPEALS, Appellate Court No. 96-77294-A

ss.

STATE OF KANSAS, District Court No. 94CR2554

The State of Kansas, to the District Court within and for the County of JOHNSON in the State of Kansas, Greeting:

WHEREAS, In a certain criminal action lately pending before you, wherein STATE OF KANSAS, plaintiff, and MARIO GARZA, defendant, a judgment was rendered by you against the said defendant from which judgment said defendant prosecuted an appeal in the Court of Appeals within and for the State of Kansas;

AND WHEREAS, on January 29, 1999, on consideration of the said appeal, it was ordered and adjudged by the said Court of Appeals that the judgment of the District Court be reversed and remanded with directions. An attested true copy of opinion attached.

and that the said _____ recover against the said _____ for costs herein expended and have execution therefor.

YOU ARE THEREFORE COMMANDED, That without delay you cause execution to be had of the said judgment of the Court of Appeals, according to law.

Costs

Fees of Clerk of the Appellate Courts..... $WAIVED

Other Costs ..... _____

Total ..... $_____

WITNESS my hand and the seal of said Court of Appeals affixed hereto, at my office, in the City of Topeka, on APR 29 1999

/s/ Carol G. Green
CAROL G. GREEN, *Clerk of the Appellate Courts*

MANDATE RECEIVED BY CLERK
TRIAL JUDGE NOTIFIED Date: 5/3/99

No. 77,294

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

MARIO GARZA,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; WILLIAM A. CLEAVER, judge. Opinion filed January 29, 1999. Reversed and remanded with directions.

Craig Durham, assistant appellate defender, and *Jessica R. Kunen,* chief appellate defender, for the appellant.

Steven J. Obermeier, assistant district attorney, *Paul J. Morrison,* district attorney, and *Carla J. Stovall,* attorney general, for the appellee.

Before LEWIS, P.J., ELLIOTT, J., and RICHARD B. WALKER, District Judge assigned.

Per Curiam: Mario Garza appeals his conviction of one count of sale of marijuana and one count of possession of marijuana without a drug tax stamp.

Garza's convictions resulted from a controlled buy made at the home of Melissa Shelby. In exchange for reduced charges on earlier drug crimes, Shelby was working with police and allowed the drug buy to occur at her residence. Several police officers observed the events leading up to the buy and were able to identify Garza as

the person who was at Shelby's home, but the only person to actually witness the buy was Shelby.

Police were also in possession of a tape recording made of Shelby's telephone conversations with Garza.

Garza was charged with the crimes over 1 year after the buy actually occurred. To say the least, Shelby was an extremely reluctant witness. She failed to appear at the first preliminary hearing and appeared at a second scheduled hearing only after being arrested and held as a material witness. Both at the preliminary hearing and the trial, Shelby stated that she remembered little or nothing about the buy. The admission of her testimony and the tape recorded conversations were the subject of extensive pretrial motion activity by Garza, including two motions in limine and one motion to suppress arguing that Shelby should not be permitted to testify. All these motions were denied by the trial court.

A few days before trial, the court held a hearing to determine whether Shelby would assert her Fifth Amendment privilege against self-incrimination. Neither, Garza nor his counsel was notified of the hearing. Shelby indicated at the hearing that she would invoke her Fifth Amendment rights, and the trial court held that she could not be called as a witness unless the State granted her immunity.

On the date of trial, Garza and his counsel were notified of the prior hearing, with Shelby at which she had invoked her Fifth Amendment rights. Garza's counsel objected to the fact that he had not been notified of the prior hearing, and the court promptly held another hearing involving Garza's counsel but without Garza being

personally present. At that hearing, the State offered Shelby immunity, and the trial court held that she could no longer assert her Fifth Amendment privilege.

In spite of Shelby's lack of recall, the trial court held she was available for cross-examination and allowed her to testify. Because of her "inability" to recall the events, the court admitted the tape-recorded conversations between Shelby and Garza. Understandably, during the trial there were a number of bench conferences outside the presence of the jury regarding Shelby's testimony. Garza was convicted of the charges.

After the trial, the judge and counsel for both parties met with jurors to discuss the case. One juror asked why so many bench conferences had been held regarding Shelby's testimony. They informed the juror that Shelby was a reluctant witness who claimed to have no recall of the buy. The juror then stated that an advance sheet tabbed to a case was left in the jury room and that the tabbed case dealt with the same issue. The juror went on to say that the jurors had read and discussed the case.

Subsequently, Garza moved for a new trial based upon juror misconduct or, in the alternative, to have the jury recalled for further questioning. The trial court denied both motions.

Garza first argues that the trial court erred in denying his motion for a new trial or, in the alternative, his motion to recall the jury. This court's review of an order denying a new trial or a motion to recall a jury is limited to whether the trial court abused its discretion. *State v. Franklin*, 264 Kan. 496, 498, 958 P.2d 611 (1998). If a constitutional right has been violated, however, a judge's

discretion is limited. *Saucedo v. Winger*, 252 Kan. 718, 731, 850 P.2d 908 (1993). Then, there is a great need for the judge to articulate the reasons for his "discretionary" decision. 252 Kan. at 731.

An exercise of discretion which results in an error of constitutional magnitude may not be held to be harmless error unless the court is willing to declare a belief that the error was harmless beyond a reasonable doubt. 252 Kan. at 732. A trial court abuses its discretion when a defendant can show that (1) the jury's act constituted misconduct; and (2) the misconduct substantially prejudiced the defendant's right to a fair trial. *State v. Goseland*, 256 Kan. 729, 735, 887 P.2d 1109 (1994).

The basis for Garza's allegation of juror misconduct is the fact that an advance sheet was left in the jury room, tabbed to a case which was directly on point to the issues in his case, and the jurors admitted to reading and discussing the case. The case involved was *State v. Johnson-Howell*, 255 Kan. 928, 881 P.2d 1288 (1994). The case involved a witness who, like Shelby, refused to testify at trial. The witness, like Shelby, had invoked his Fifth Amendment privilege and then refused to testify. As in the present case, over defense counsel's hearsay objections, the witness' prior out-of-court statements were admitted into evidence. The Supreme Court found that the trial court had erred in admitting the witness' testimony pursuant to K.S.A. 60-460(a) because the witness refused to testify and was therefore not available for cross-examination. The Supreme Court ultimately found, however, that the error was harmless in view of the overwhelming evidence of the defendant's guilt. *Howell-Johnson* [sic], 255 Kan. at 952.

Garza correctly points out that prior to reading this case, the jury was left to wonder why Shelby could not recall the events of the drug buy and why there were so many bench conferences outside the jury's presence. After reading the case, the jury could "[fill] in the blanks" and speculate that Shelby had made incriminating statements similar to the witness in *Howell-Johnson* [sic] and that these statements were being kept from them.

The trial court itself admitted to leaving the advance sheet – tabbed to the *Howell-Johnson* [sic] case – in the jury room during pretrial motions. The State admits that the case was on point, but argues that all the case does is "kind of explains the legal process . . . how the Court process works." Further, the State argues that as a matter of law, the trial court is forbidden from inquiring into the thought processes of the jurors and, therefore, the jurors cannot be recalled.

This argument fails. The Kansas Supreme Court has held that the statutory prohibition against impeachment of a jury does not apply when a party claims that his or her constitutional right to a fair trial was violated by jury misconduct. *Saucedo,* 252 Kan. 718, Syl. ¶ 2.

Further, the fact that the case "explained the legal process" is precisely why the reading of the case by the jurors was prejudicial. The jury is supposed to learn about the legal process or how the court works only through jury instructions. The reading of this case – a case directly on point and used to support motions in the case – went far beyond those instructions. The State's argument that it would be "far more detrimental to a fair trial for a jury to look at a dictionary defining legal

terms," referring to the Supreme Court's ruling in *State v. Duncan*, 3 Kan. App. 2d 271, 593 P.2d 427 (1979), that the reading of the definition for the legal term "assault" in a dictionary did not prejudice a criminal defendant, is specious at best.

To compare a case in which the jury looked up the word "assault" to a case in which the jurors read a decision directly on point to one of the most litigated issues in a trial defies common sense. *Cf. State v. Goseland*, 256 Kan. 729. Moreover, it was the trial court itself that left the advance sheet in the jury room, making the error even more grievous. The State also argues that other jurisdictions have held that the mere reviewing of a case law reported does not amount to sufficient evidence to necessitate a new trial. See *United States v. Hill*, 688 F.2d 18 (6th Cir.), *cert. denied* 459 U.S. 1074 (1982); *State v. Powell*, 400 N.W. 2d 562 (Iowa 1987); *Annaratone v. State*, 399 So.2d 825 (Miss. 1981); *State v. Taylor*, 917 S.W.2d 222 (Mo. App. 1996).

While this is true, these cases are easily distinguishable from the present case. In each of those cases the jury found extrinsic legal materials and read through them. In one case, the jury looked up the appropriate punishment for a defendant, although the jury was responsible for the guilt phase of the trial not the punishment phase. In *none* of the cases, however, did the jurors read a case directly on point to the issues in the trial from extrinsic legal materials left in the jury room *by the court itself.*

Shelby's testimony – or lack of testimony – was the central issue in this case. The jurors' reading of the *Johnson-Howell* case, which explained the law regarding

the admission of her testimony and her ability to invoke her Fifth Amendment privilege was clearly misconduct and substantially prejudiced Garza. The trial court's refusal to grant a new trial or to recall the jury to determine whether the extrinsic evidence substantially affected the jury's verdict was error which requires this court to reverse and remand for a new trial. See *Saucedo v. Winger,* 252 Kan. at 733.

Next, Garza argues that the district court erred in holding two hearings outside of his presence, thereby violating his rights to due process and confrontation of a witness. Whether a defendant's right to confrontation and presence has been violated is a question of law. A question of law is subject to de novo review *State v. Donlay,* 253 Kan. 132, Syl. ¶ 1, 853 P.2d 680 (1993). A defendant has a constitutional and statutory right to be present at every state [sic] of his or her trial. U.S. Const., 6th Amend.; K.S.A. 22-3405.

The first hearing that was held outside of Garza's presence was a hearing before trial to determine what Shelby's testimony would be and to determine whether she would invoke her Fifth Amendment privilege. Neither defense counsel nor defendant was notified of the hearing. This court has held that a defendant's presence at in-chambers conferences concerning questions of law is not essential to a fair and just determination of those questions. *State v. Rhoads,* 20 Kan. App. 2d 790, Syl. ¶ 1, 892 P.2d 918 (1995). Whether Shelby would testify was not only a question of law, it was the central question around which both the State and defense cases revolved.

In *State v. Willis*, 254 Kan. 119, 124, 864 P.2d 1198 (1993), the Supreme Court held that where a deposition of the key witness in a murder trial was taken outside of the presence of the defendant, his confrontation rights were violated. As in *Willis*, there is no showing here that Garza was notified of his right to be present at the hearing. Additionally, Shelby was the only witness who actually saw the drug buy and, for this reason, her testimony was vital to the determination of Garza's guilt or innocence.

If Garza's confrontation rights were denied, in order to affirm the trial court's ruling, this court must find beyond a reasonable doubt that his absence had little if any likelihood of changing the result of the trial. See *Willis*, 254 Kan. at 123. As in *Willis*, this court would be hard pressed to do so.

"The essence of assisting in one's defense depends upon being confronted with the evidence and witnesses." *Willis*, 254 Kan. at 124. Shelby's testimony was crucial to the State's case. Throughout the proceedings, Garza objected to Shelby's testimony. He objected both through motions and orally. Whether Shelby would testify and whether she would invoke her Fifth Amendment privilege was the central focus of the pretrial motions in this case and most of the bench conferences during the trial.

Shelby was the only direct witness to the crime. Because Shelby's testimony was central to both the prosecution and the defense in this case, this court cannot say beyond a reasonable doubt that Garza's absence from the hearing had little, if any, likelihood of changing the result of the trial. Accord *Willis*, 254 Kan. at 126-27.

Having concluded that the defendant's absence from the first hearing violated his constitutional rights, it follows that his absence from the second hearing – held the first day of trial and regarding the same issues – also violated his rights

Finally, Garza argues that the introduction of Shelby's tape-recorded conversation with him was inadmissible hearsay and that its admission violated his right to confront all witnesses against him.

Shelby's testimony at the preliminary hearing and trial was consistent. She stated again and again that she could not recall the events related to the controlled buy. Because of her lack of recall, the State sought to introduce the tape-recorded conversations between Shelby and Garza pursuant to K.S.A. 60-460(a), previous statements of a person present, or 60-460(j), as a declaration against interest. The trial court found that Shelby was available for cross-examination, and admitted the testimony as a declaration against interest.

A district judge has wide discretion in determining the admissibility of hearsay evidence under the declaration against interest exception. *State v. Cooper,* 20 Kan. App. 2d 759, 761, 892 P.2d 909, *rev. denied* 257 Kan. 1093 (1995). K.S.A. 60-460(j) contemplates that certain out-of-court statements are admissible in court if the judge, using judicial discretion, finds that the proffered hearsay statement was at the time of the assertion so far contrary to the declarant's interest or subjected the declarant to civil or criminal liability to the extent that a reasonable person in declarant's position would not have made the statement unless he believed such statement to be true.

Additionally, the party offering the evidence must also make a showing of trustworthiness by the declarant. 20 Kan. App. 2d at 762.

If, however, a declarant has no good reason to believe that the assertion will bring harm or believes the assertion is more likely to cause benefit rather than harm, the assertion will not be excepted from the hearsay rule. 20 Kan. App. 2d at 763. The tape-recorded conversation between Shelby and Garza took place *after* she had already been arrested and *after* she had agreed to cooperate with the police. Shelby agreed to the controlled buy and made the statements in her role as a confidential informant. The statements did not subject her to further prosecution and, in fact, benefitted her. It is difficult to understand how statements which *benefitted* Shelby – she was allowed to plead to a lesser charge for her crimes – were a declaration against interest.

Shelby's statements were also inadmissible pursuant to K.S.A. 60-460(a). A statement previously made by a person who is present at the hearing and available for cross-examination is admissible as an exception to the general rule that hearsay is inadmissible. K.S.A. 60-460(a). This exception does not apply in the present case because, for all intents and purposes, Shelby refused to testify. See *State v. Johnson-Howell,* 255 Kan. at 937; *Cooper,* 20 Kan. App. 2d at 763. The State did not seek to admit the testimony under any of the other hearsay exceptions and, even if it had, they do not appear to apply.

The trial court abused its discretion in admitting the tape-recorded testimony where the statements were not

against Shelby's interest and where she claimed to have no recall of the buy. Having already determined that Garza's Confrontation Clause rights were violated, it is unnecessary to determine whether those same rights were violated by allowing the admission of a witness who was "unavailable" for cross-examination.

Garza's convictions are reversed and the case is remanded for a new trial.

Reversed and remanded with directions.

A true copy ATTEST

/s/ Carol G. Green
Clerk Supreme Court

SUPREME COURT ORDER

DISTRICT CASE
NO. 94CR2554

IN THE SUPREME COURT

OF THE STATE OF KANSAS

DISTRICT ATTORNEY JOHNSON COUNTY
JOHNSON COUNTY COURTHOUSE
PO BOX 728
OLATHE KS 66061

STATE OF KANSAS, APPELLEE,
v
NO. 96-77294-AS

MARIO GARZA, APPELLANT

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION FOR REVIEW BY STATE OF KANSAS.

CONSIDERED BY THE COURT AND DENIED.

DATE: 04/27/99.

CAROL G. GREEN
CLERK

SUPREME COURT ORDER

DISTRICT CASE
NO. 94CR2554

IN THE SUPREME COURT
OF THE STATE OF KANSAS

DISTRICT ATTORNEY JOHNSON COUNTY
JOHNSON COUNTY COURTHOUSE
PO BOX 728
OLATHE KS 66061

STATE OF KANSAS, APPELLEE,

NO. 96-77294-AS

MARIO GARZA, APPELLANT

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION TO PUBLISH MEMORANDUM OPINION
FILED BY MARIO GARZA
CONSIDERED BY THE COURT AND GRANTED.
APPELLEE'S RESPONSE & REPLY NOTED.

DATE: 06/09/99.

CAROL G. GREEN
CLERK